Chellappa a/l Kalimuthu v Sime UEP Properties Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 21-353 OF 1996
MOHD HISHAMUDIN J
29 NOVEMBER 2001

Civil Procedure *— Amendment — Statement of claim — Grounds for amendment — Grounds stated in summons in chambers were vague — Concise and substantive statements of ground must be stated — Whether grounds in supporting affidavit alone sufficient — Whether summons in chambers complied with O 32 r 1 and Form 62 of Rules of the High Court 1980 — Whether summons in chambers was defective by reason of non-compliance*

This was an interlocutory application in encl 55 by the plaintiff to amend his statement of claim. The first defendant's counsel raised a preliminary objection regarding the plaintiff's application. According to the counsel, the plaintiff's summons in chambers was defective by reason of non-compliance with O 32 r 1 and Form 62 of the Rules of the High Court 1980 ('the RHC') because the grounds for the application to amend the statement of claim were not stated in the summons in chambers. The summons in chambers stated that '... the grounds for making the amendment were that the facts proposed to be added in the statement of claim were important and ought to be included in order to disclose all relevant information to the court ...'.

Held, upholding the preliminary objection and dismissing the plaintiff's application:

(1) It was imperative that the grounds for the application be stated in the summons in chambers. The word 'must' was used in O 32 r 1 of the RHC and Form 62 stipulated the requirement in clear terms by the presence of the words 'the grounds of the application are (state the grounds) ...' in the said form. As such, the grounds were an important and essential part of the summons as prescribed by O 32 r 1 and Form 62. Without stating the grounds in the summons in chambers, there had been a serious non-compliance with O 32 r 1 of the RHC (see p 213D–F).

(2) In the instant case, the words in the summons in chambers were too vague to be regarded as a general ground. As to what the 'grounds' must contain, there were no rigid rules, nor a standard format. It all depended on the circumstances of the individual case. What was required was a concise but clear statement of the grounds or reasons for the amendment. It must contain substantive information (see pp 213G–H, 214B–C).

(3) As stated in *Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd* [1998] 2 MLJ 167, where the specific rule in the RHC stipulated that the grounds must be stated in the notice in motion, then the grounds must be stated in the notice of motion itself. It would not suffice for the grounds to be set out, even if in detail, in the

supporting affidavit and the failure to state the grounds in the notice of motion itself rendered the notice incomplete and irregular and the court should reject the notice of motion. The principle enunciated in *Dr Woo Kin Chong* applied equally to a summons under O 32 r 1 of the RHC (see p 214F–H); *BSN Commercial Bank (M) Bhd v KDG Holdings (M) Sdn Bhd & Ors* [1999] 1 MLJ 567 not followed.

[Bahasa Malaysia summary

Ini adalah satu permohonan interlokutori dalam lampiran 55 oleh plaintif untuk meminda pernyataan tuntutan beliau. Peguam defendan pertama telah menimbulkan satu bantahan awal berhubung permohonan plaintif. Menurut peguam tersebut, saman dalam kamar plaintif adalah cacat oleh sebab ketidakpatuhan A 32 k 1 dan Borang 62 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana alasan-alasan untuk permohonan untuk membuat pindaan kepada pernyataan tuntutan tidak dinyatakan dalam saman dalam kamar tersebut. Saman dalam kamar tersebut mengatakan bahawa '... the grounds for making the amendment were that the facts proposed to be added in the statement of claim were important and ought to be included in order to disclose all relevant information to the court ...'.

Diputuskan, mengekalkan bantahan awal dan menolak permohonan plaintif:

(1) Adalah sangat mustahak bahawa alasan-alasan untuk permohonan tersebut dinyatakan dalam saman dalam kamar. Perkataan 'must' yang digunakan dalam A 32 k 1 KMT dan Borang 62 menyatakan keperluan ini dalam terma-terma yang jelas dengan wujudnya perkataan-perkataan 'the grounds of the application are (state the grounds) ...' di dalam borang tersebut. Oleh itu, alasan-alasan tersebut merupakan satu bahagian yang penting dan perlu dalam saman dalam kamar sebagai mana yang dinyatakan dalam A 32 k 1 KMT dan Borang 62. Jika tidak dinyatakan alasan-alasan dalam saman dalam kamar, maka ia merupakan satu ketidakpatuhan A 32 k 1 KMT yang serius (lihat ms 213D–F).

(2) Dalam kes ini, perkataan-perkataan dalam saman dalam kamar adalah tidak jelas untuk dianggap sebagai satu alasan am. Berhubung dengan apa yang perlu terkandung dalam 'alasan-alasan', tiada peraturan yang ketat, maupaun satu format standard. Semuanya bergantung kepada keadaan kes individu. Apa yang diperlukan adalah satu pernyataan yang ringkas dan padat tetapi jelas tentang alasan-alasan atau sebab-sebab untuk pindaan tersebut. Ia mesti mengandungi maklumat yang substantif (lihat ms 213G–H, 214B–C).

(3) Sebagai mana yang dinyatakan dalam *Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd* [1998] 2 MLJ 167, di mana peraturan khusus dalam KMT memperuntukkan bahawa alasan-alasan mestilah dinyatakan dalam notis usul, maka alasan-alasan tersebut mestilah dinyatakan dalam notis usul tersebut. Adalah tidak memadai untuk alasan-alasan tersebut dinyatakan, walaupun jika secara terperinci, dalam afidavit sokongan dan kegagalan untuk menyatakan alasan-alasan dalam notis usul sendirinya akan mengakibatkan notis tersebut tidak lengkap dan di luar aturan dan mahkamah hendaklah menolak notis usul tersebut. Prinsip yang dinyatakan dalam *Dr Woo Kin Chong* diterapkan sama seperti dalam satu saman di bawah A 32 k 1 KMT (lihat ms 214F–H); *BSN Commercial Bank (M) Bhd v KDG Holdings (M) Sdn Bhd & Ors* [1999] 1 MLJ 567 tidak diikut.]

Notes

For cases on amendment of statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 478–488.

Cases referred to

BSN Commercial Bank (M) Bhd v KDG Holdings (M) Sdn Bhd & Ors [1999] 1 MLJ 567 (not folld)

Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd [1998] 2 MLJ 167 (folld)

Legislation referred to

Rules of the High Court 1980 O 32 r 1, O 69 r 4(2), Form 62

K Kirubakaran (*Kiru & Yong*) for the plaintiff.

Deborah Kaur (*Mah Weng Kai & Associates*) for the first defendant.

Kamarulzaman (Assistant State Legal Adviser Selangor) for the second and third defendants.

Mohd Hishamudin J: This summons in chambers (encl 55) is an interlocutory application by the plaintiff to amend the statement of claim.

At the hearing of the application, the Assistant State Legal Adviser Selangor, En Kamarulzaman, appearing for the second and third defendants, informed the court that he has no objection to the application.

The first defendant, however, objected to the application. A preliminary objection was raised by Ms Deborah Kaur, the learned counsel for the first defendant, regarding the summons in chambers. She submitted that the summons in chambers was defective by reason of non-compliance with O 32 r 1 and Form 62 of the Rules of the High Court 1980 ('the RHC'). She argued that there was non-compliance because the grounds for the application to amend the statement of claim were not stated in the summons in chambers. Learned counsel contended that, in the light

of the word 'must' in O 32 r 1 of the RHC, it was mandatory for the applicant/plaintiff to state the grounds in the summons in chambers and that the failure to do so was fatal to the application.

Order 32 r 1 of the RHC states:

> Mode of making application
>
> Except as provided by O 25 r 7 of the RHC, every application in chambers *must* be made by summons in Form 62 (Emphasis added.)

Form 62 of Appendix A of the RHC sets out the format of the summons as follows:

> No 62
> SUMMONS IN CHAMBERS (O 32 r 1)
> (Title as in action)
>
> Let all parties concern attend before the Judge (or Registrar) in Chambers on ..., the ... day of ... 19..., at ... am on the hearing of an application on the part of (state nature of the application).
>
> The grounds of the application are (state the grounds)
>
> Dated the ... day of ... 19...
>
> Entered No ... of 19...
>
> Clerk
>
> (Seal)
>
> .....
> Registrar
>
> This summons is taken out by the plaintiff (or as the case may be) of (state address).
>
> To the defendant (or as the case may be).

In support of her argument, Ms Deborah Kaur, in her written submission, cited *Dr Woo Kin Chong v Mary Ou Holdings Sdn Bhd* [1998] 2 MLJ 167 where Nik Hashim JC (as he then was) held (at p 172):

> Accordingly, the notice of motion must contain the grounds. This is a basic requirement. The grounds must be stated within the four corners of the notice itself. Affidavit is not a ground, but it contains evidence. It is a separate document from the notice and its purpose is to verify the facts in the grounds. The affidavit cannot supply the missing grounds which are required to be set out in the grounds in general terms to be stated in the notice itself. The notice without the grounds is in incomplete and irregular. An incomplete notice is as good as no notice at all.

The learned counsel for the plaintiff, Mr Kirubakaran, on the other hand, in his written submission, argued that there was compliance with Form 62 in that the grounds have been stated in general terms in the summons in chambers; and learned counsel further submitted that there was also in the summons reference to the grounds in the supporting affidavit.

In the present case, it is stated in the summons in chambers as follows (I shall only refer to the relevant portion of the summons):

> Alasan-alasan membuat adalah bahawa fakta-fakta yang dicadangkan untuk disertakan dalam pernyataan tuntutan adalah penting dan seharusnya

A disertakan untuk mendedahkan segala maklumat berkenaan kepada mahkamah terhormat dan tidak memprejudiskan defendan-defendan dan selanjutnya seperti dinyatakan di dalam afidavit Chellappa a/l K Kalimuthu yang diikrarkan dan difailkan di sini.

Learned counsel for the plaintiff fortified his contention by citing *BSN Commercial Bank (M) Bhd v KDG Holdings (M) Sdn Bhd & Ors* [1999] B 1 MLJ 567 where Abdul Aziz J held (at p 569):

> It was submitted that the summons in chambers by which the plaintiffs applied for summary judgment did not comply with O 32 r 1 of the Rules of the High Court in that it did not state the grounds of the application although it did bear a statement referring for the grounds to the affidavit in support of C the application.
>
> A question that might have been raised by learned counsel for the plaintiffs is whether O 32 r 1, which concerns application in chambers by summons generally, applies to an application for summary judgment, in view of the act that O 14 r 2(1) sets out specifically the mode of applying for summary judgment. The point, however, was not raised. Be that as it may, I D think it would be sufficient compliance with Form 62 if a summons stated the grounds, as was done in this case, by reference to an affidavit in support of the application.

In my judgment, it is imperative that the grounds for the application be stated in the summons. For the word 'must' is used in r 1 of O 32, and E Form 62 stipulates the requirement in clear terms by the presence of the words:

> The grounds of the application are (state the grounds)

in the form. In my opinion, the grounds are an important and essential part of the summons as prescribed by O 32 r 1 and Form 62 of the RHC. F Without stating the grounds in the summons in chambers, there has been a serious non-compliance with O 32 r 1 of the RHC with the consequence that encl 55 cannot be said to be an application made by summons in Form 62.

Now, with reference to encl 55, the words:

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> Alasan-alasan membuat adalah bahawa fakta-fakta yang dicadangkan untuk disertakan dalam pernyataan tuntutan adalah penting dan seharusnya disertakan untuk mendedahkan segala maklumat berkenaan kepada mahkamah terhormat dan tidak memprejudiskan defendan-defendan ...

as found in the summons are too vague even to be regarded as a general H grounds. They are too vague to be of any legal significance. I regret to say that the plaintiff, by purporting to state the grounds in such a manner, is clearly merely paying lip service to the rules. To my mind, as far as the present application is concerned, in the manner that the so-called 'grounds' were set out in the summons, it is as good as if no grounds were given in the summons. I note with sadness that, despite ample judicial decisions on the I point, time and again litigants have to be reminded that rules of procedure are to be respected and taken seriously. And now I am stressing it again that compliance with rules of procedure are not meant to be only optional, or to

be complied only by the diligent and rule abiding litigants. Neither are they to be ignored nor to be taken very lightly with impunity by the indolent. If the latter is the case, then I fear that the diligent and rule-abiding solicitors will become the laughing stock of their fellow errant professionals.

Lest that I be misunderstood, it is not suggested here that the grounds or reasons for the application to amend the statement of claim must be set out in detail in the summons. As to what the 'grounds' must contain, there are no rigid rules; nor a standard format. It all depends on the circumstances of the individual case. Needless to say, the reason to amend differs from one case to another. But what is required, however, is a concise but clear statement of the grounds or reasons for the amendment. The statement should not be verbose but empty of meaning, as in the present case. It must contain substantive information. For example, if the reason for the amendment to the statement of claim is (say) the subsequent discovery of new facts by the plaintiff, then it must be stated clearly in the summons, as the grounds for the application, the following:

(a) some information as to when the new facts were discovered (there is no necessity to give the exact date if that is not possible);

(b) some information (which need not be too detail) as to what are the new facts; and

(c) a brief explanation as to the relevance of the newly discovered facts to the plaintiff's claim.

Further, it is also to be observed that the so-called 'grounds' in the plaintiff's summons went on to state:

> ... dan selanjutnya seperti dinyatakan di dalam afidavit Chellappa a/l K Kalimuthu yang diikrarkan dan difailkan di sini.

This reference in the summons in the present case to the grounds in the plaintiff's supporting affidavit is also of no help to the plaintiff for the purpose of O 32 r 1 of the RHC. I agree with the decision of the learned judicial commissioner in *Dr Woo Kin Chong* that where the specific rule in the RHC stipulates that the grounds must be stated in the notice in motion then the grounds must be stated in the notice of motion itself: it will not suffice that the grounds are set out, even if in detail, in the supporting affidavit; and that failure to state the grounds in the notice of motion itself renders the notice incomplete and irregular, and the notice of motion should be rejected by the court. It is, however, true that *Dr Woo Kin Chong* concerns a notice of motion under O 69 r 4(2) of the RHC whereas the instant case concerns a summons in chambers under O 32 r 1 of the RHC. Be that as it may, in my view, the principle enunciated in the case cited, nevertheless, equally applies to a summons under O 32 r 1 of the RHC.

With respect, I have to differ with the decision of the learned judge on the point in *BSN Commercial Bank*. In any case, perhaps I should add, if I may be permitted to do so, that, in considering this case (*BSN Commercial Bank*) as a judicial precedent on the interpretation and effect of O 32 r 1 of the RHC, one must also take note of the fact that the learned judge, in his

ruling, appears somewhat to entertain some doubt on the applicability of O 32 r 1 of the RHC, to the application before him. For, just before making his ruling on the point, his Lordship had commented (to repeat):

> A question that might have been raised by learned counsel for the plaintiffs is whether O 32 r 1, which concerns application in chambers by summons generally, applies to an application for summary judgment, in view of the act that O 14 r 2(1) sets out specifically the mode of applying for summary judgment. The point, however, was not raised.

In my opinion, the above dicta has a bearing on the weight of the precedent in *BSN Commercial Bank* on the issue in question.

Accordingly, the preliminary objection is upheld and the application is dismissed with costs.

Preliminary objection upheld and plaintiff's application dismissed.

Reported by Lim Lee Na